

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO *et al.*,

Debtors.¹

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

PUERTO RICO ELECTRIC POWER AUTHORITY

Debtor.

X

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: PROMESA

: Title III

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: Case No. 17-BK-3283 (LTS)

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: (Jointly Administered)

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X

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: PROMESA

: Title III

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: Case No. 17-BK-4780 (LTS)

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: **This Objection relates to PREPA**
and shall be filed in Lead Case

: **No. 17BK 3283-LTS and Case**

: **No. 17-BK-4780 LTS**

X

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF TRADEWINDS
ENERGY TO OMNIBUS MOTION OF PUERTO RICO ELECTRIC POWER
AUTHORITY FOR ENTRY OF AN ORDER (A) AUTHORIZING PREPA TO REJECT
CERTAIN POWER PURCHASE AND OPERATING AGREEMENTS, AND (B)
GRANTING RELATED RELIEF**

¹ The Debtors in these Title III cases, along with each Debtor's respective Title III case number listed as a bankruptcy case number due to software limitations and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17-BK-3283 (LTS)) (Last Four Digits of Federal Tax ID: 3481), (ii) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17-BK-3566 (LTS)) (Last Four Digits of Federal Tax ID: 9686), (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17-BK-3567 (LTS)) (Last Four Digits of Federal Tax ID: 3808), (iv) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17-BK-3284 (LTS)) (Last Four Digits of Federal Tax ID: 8474), and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17-4780 (LTS)) (Last Four Digits of Federal Tax ID: 3747).

Creditors Tradewinds Energy Vega Baja, LLC and Tradewinds Energy Barceloneta, LLC, as assignees of Tradewinds Energy, LLC (collectively, the “Tradewinds Creditors”) file this limited objection (the “Limited Objection”) and reservation of rights to the *Omnibus Motion of Puerto Rico Electric Power Authority for Entry of an Order (a) Authorizing PREPA to Reject Certain Power Purchase and Operating Agreements, and (b) Granting Related Relief* (the “Rejection Motion”) filed by the Puerto Rico Electric Power Authority (“PREPA”), and respectfully represent as follows:

BACKGROUND

1. Before PREPA initiated its Title III Case,² the Tradewinds Creditors initiated an arbitration proceeding (the “Pre-Petition Arbitration Proceeding”) against PREPA on January 18, 2016 as a result of PREPA’s series of breaches of two separate PPOAs (the “Tradewinds PPOAs”). Under the Tradewinds PPOAs, the Tradewinds Creditors agreed to build wind turbine facilities for PREPA (and the Commonwealth) and, in return, PREPA contractually agreed to buy the electricity from the Tradewinds Creditors at a predetermined price.

2. The Tradewinds PPOAs required PREPA’s minimal, but essential cooperation: PREPA had to acknowledge its agreements with the Tradewinds Creditors *and* provide the pertinent Commonwealth permitting agency the authorization to provide the permits necessary for the Tradewinds Creditors to construct the wind turbine facilities. Contrary to PREPA’s obligations under the respective Tradewinds PPOAs, PREPA withheld its cooperation and withheld its authorization, avoiding its contractual promises and ignoring the Tradewinds Creditors repeated demands for the most basic cooperation.

² For the Court’s ease of reference, the Tradewinds Creditors respectfully submit that they intend all capitalized terms not otherwise defined in this limited objection to have the meanings given to them in the Rejection Motion.

3. As set more fully in the Pre-Petition Arbitration Proceeding, PREPA breached its contractual obligations under the Tradewinds PPOAs in that PREPA (i) interfered with and obstructed the Tradewinds Creditors' timely efforts to obtain the required permits necessary to continue performance; and (ii) engaged in a continual and systematic course of ignoring its contractual and lawful duty to cooperate with the Tradewinds Creditors in effecting the terms of the PPOAs, which included, but were not limited to, the duties of cooperation, good faith, and fair dealing. PREPA's breaches excused any further performance by the Tradewinds Creditors.

4. On its Petition Date, PREPA recognized that the Tradewinds Claims are unsecured "Litigation" claims, and valued the Tradewinds Claims in the amount of \$30,000,000.00. *See* Case No. 17-04780-LTS, ECF No. 1 (identifying the Tradewinds Claims on PREPA's "List of Creditors Who Have the 20 Largest Unsecured Creditors and Are Not Insiders").

5. After PREPA's Petition Date, the Tradewinds Creditors timely filed their respective proofs of claim against PREPA, asserting claims in the aggregate amount of \$34,000,000.00 (the "Tradewinds Claims"). Copies of the Tradewinds Claims are attached to this limited objection as composite **Exhibit A**.³

LIMITED OBJECTION AND RESERVATION OF RIGHTS

6. The Tradewinds Creditors object to the Rejection Motion, and the corresponding proposed form of order, solely to the extent that it purports to determine that PREPA can terminate the Tradewinds PPOAs without liability.

7. The Rejection Motion and proposed Order improperly seek to invoke the termination provisions of the PPOAs to terminate "without further liability" because the Tradewinds Creditors did not achieve certain "Commercial Operation Dates" and/or

³ The Tradewinds Claims each attach a copy of the *Demand for Arbitration* that gave rise to the Pre-Petition Arbitration Provision.

“Commencement of Construction” dates within a specific period of time. *See* Rejection Motion, ECF No. 13579, ¶ 11

8. PREPA fails to inform the Court of the Tradewinds Creditors’ Pre-Petition Arbitration Demand arising from PREPA’s material breaches of the contracts. Those material breaches excused the Tradewinds Creditors obligation to perform. Therefore, PREPA is unable as a matter of law to now terminate the Tradewinds PPOAs. *Mercado-Salinas v. Bart Enterprises Intern., Ltd.*, 671 F.3d 12, 22 (1st Cir. 2011) (“[U]nder Puerto Rico law, a party must comply with its own contractual obligations before it can demand compliance from the other party. See P.R. Laws Ann. tit. 31, § 3052. A party's breach effectively suspends the nonbreaching party's duty to tender performance.”)

9. Accordingly, the Tradewinds Creditors object to the Rejection Motion to the extent PREPA is attempting to now terminate their claims “without further liability” as a means to short circuit the determination of the existing Tradewinds Claims. The validity and merits of the Tradewinds Claims—and any potential “rejection damage claims”—should be resolved through the formal claims resolution process before the Court.

10. PREPA’s Rejection Motion seeks to attempt to conflate its request for rejection of the Tradewinds PPOAs with the formal claims resolution process, which is plainly improper. Whether or not PREPA in fact “should be able to terminate the [Tradewinds Creditors’] PPOAs without further liability or incurring rejection damage claims” requires a resolution on the merits of the Tradewinds Claims (and any forthcoming rejection damages claims upon any order of the Court authorizing rejection of the PPOAs at issue).

RESERVATION OF RIGHTS

11. The Tradewinds Creditors expressly reserve the right to supplement and/or amend this Limited Objection from time to time and at any time. The Tradewinds Creditors further reserve any and all rights to raise any additional objections with respect to the Rejection Motion or otherwise with respect to any relief requested as it may affect the Tradewinds PPOAs or the interests of the Tradewinds Creditors.

WHEREFORE, the Tradewinds Creditors respectfully request that the Court (i) deny the Rejection Motion as to the Tradewinds Creditors to the extent such motion seeks termination of the PPOAs “without further liability”, and (ii) grant the Tradewinds Creditors such other and further relief as the Court deems proper.

Dated: July 14, 2020

Respectfully submitted,

/s/ John Arrastia

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